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In the Supreme Court of the United States

FIDEL CINTORA AGUILAR,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The question presented in this case is whether an alien convicted after a jury trial who gives up his right to appeal in order to avoid deportation may apply for discretionary relief under former Section 212(c). The government concedes that the circuits are in conflict on what kind of pre-IIRIRA reliance on the availability of Section 212(c) relief – if any – must be demonstrated by an alien who now seeks relief under that provision. It also acknowledges that petitioner unquestionably would be entitled to relief in the Third Circuit and, as we show below, aliens in petitioner's position also would prevail in at least two other courts of appeals. And the government does not deny the substantial national importance of the question presented here, which has been addressed dozens of times by the federal courts and immigration judges in recent years. The government accordingly does *not* dispute that the issue here warrants this Court's attention.

Instead, in opposing the petition the government principally contends that "this case is not a suitable vehicle for deciding the question presented" because petitioner relied upon the pre-IIRIRA definition of "conviction," not Section 212(c), in foregoing his appeal. Opp. 7. But this argument is meritless, for two reasons. First, the question in this case is what type of reliance, if any, is required to apply for discretionary relief under Section 212(c), not whether petitioner actually relied on the availability of Section 212(c) relief. That question is squarely presented here. Second, contrary to the government's assertion, petitioner and other aliens in his position plainly would have "objectively" relied on the availability of relief under Section 212(c). This case therefore is

an entirely suitable vehicle with which to resolve the acknowledged conflict in the circuits and, if the Court concludes that the "objective reliance" standard is appropriate, with which to provide guidance on the nature of that standard.

The government further contends certiorari should be denied because a regulation issued in 2004 bears on the question presented. But most of the decisions contributing to the circuit conflict *post-date* the regulation. There is no reason to believe that any court will reconsider its position on this basis. The government provides no explanation as to how the regulation could affect the disagreement among the circuits.

The government's defense of the retroactive application of IIRIRA's definition of conviction is also incorrect. Retroactively applying the revised definition fails this Court's heightened rationality requirement. Indeed, the government's concession that petitioner relied on the pre-IIRIRA definition of "conviction" in abandoning his appeal (Opp. 7-8) confirms that the decision below cannot be squared with the most "elementary considerations of fairness." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994).

I. This Case Squarely Presents The Acknowledged Conflict Over Whether An Alien Must Show Actual, Objective, Or No Reliance On Section 212(c).

As the government concedes, "petitioner has identified a conflict among the circuits about the *type* of reliance that is required under [*INS* v. *St. Cyr*, 533 U.S. 289 (2001)] to establish a retroactive effect." Opp. 8 (emphasis in original). There is no denying

the scope or severity of this conflict, or that its resolution is essential to ensure the uniform application of federal immigration law.

A. The courts of appeals are divided over the role of reliance when determining whether Section 212(c) is impermissibly retroactive.

1. Three courts of appeals, including the court below, require a showing of actual reliance on the availability of Section 212(c) in order to grant relief under that provision. See *Wilson* v. *Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006) ("There needs to be an individualized showing to ensure us that an application of IIRIRA that forestalls 212(c) relief is impermissibly retroactive."); *Carranza-De Salinas* v. *Gonzales*, 477 F.3d 200, 210 (5th Cir. 2007) ("If, however, Carranza can demonstrate on remand that she affirmatively decided to postpone her [Section] 212(c) application to increase her likelihood of relief, then she has * * * established a reasonable 'reliance interest' in the future availability of [Section] 212(c) relief comparable to that of the applicants in *St. Cyr* and she is entitled to make her application for relief."); *Lara-Ruiz* v. *INS*, 241 F.3d 934, 945 (7th Cir. 2001).

2. In contrast, at least two other courts of appeals have adopted an "objective reliance" standard. One of them, the Tenth Circuit, has expressly "disagree[d] with" the "actual reliance" courts. *Hem* v. *Maurer*, 458 F.3d 1185, 1187 (10th Cir. 2006). It instead employs an "objectively reasonable reliance" inquiry, which "generalize[s] a category of affected aliens from the facts of the case" and then asks whether the conduct of those aliens could "have reasonably been motivated by the availability of [Section] 212(c) relief." *Id.* at 1199. Thus "a defendant

who proceeds to trial but forgoes his right to appeal when [Section] 212(c) relief was potentially available has suffered retroactive effects under IIRIRA." *Id.* at 1187. The Sixth Circuit has adopted the same standard. *Thaqi* v. *Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004) ("[U]nder *St. Cyr*, the petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect; he need only be among a class of aliens whose guilty pleas 'were likely facilitated' by their continued eligibility for [Section] 212(c) relief.").

3. Unlike these courts, the Third Circuit holds that the repeal of Section 212(c) has an impermissible retroactive effect even in the absence of either actual or objective reliance. See *Atkinson* v. *Att'y Gen.*, 479 F.3d 222, 227 (3d Cir. 2007) ("[T]he question is whether [the statute] attaches new legal consequences to past events * * *. The Court has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively.").

B. This case is an appropriate vehicle for resolving the question presented.

Although the government concedes the existence of the conflict, it insists that the "conflict is irrelevant to the instant case" (Opp. 8) because petitioner relied on the pre-1996 definition of "conviction" in foregoing his appeal and therefore "did not subjectively or objectively rely upon the likelihood that he might later receive Section 212(c) relief from deportation." Opp. 7. That contention is wrong.

In fact, the government goes astray in two respects: it ignores both the nature of the conflict in the courts of appeals and the character of "objective

reliance." As is shown above, the legal question here is not whether petitioner *actually relied* on the availability of Section 212(c); it is whether actual reliance is required *at all*. Even if the government is correct that petitioner did not actually rely on the availability of Section 212(c), this case would still be resolved differently in the circuits that require no reliance or only "objective reliance."

Had petitioner attempted to reenter the United States in the Third Circuit – a "no reliance" jurisdiction – rather than the Fifth Circuit, the government concedes that he would have been permitted to apply for Section 212(c) relief. Opp. 9. In the Third Circuit, the operative question is simply whether "applying IIRIRA to eliminate the availability of discretionary relief under former Section 212(c) attach[es] new legal consequences to events completed before the repeal." *Atkinson*, 479 F.3d at 230. As in *Atkinson*, this case involves new "legal consequences" to events that "occurred in the past and cannot be changed." *Ibid.* The Third Circuit would therefore conclude that petitioner is eligible for Section 212(c) relief.

Similarly, had petitioner's case arisen in an "objective reliance" jurisdiction, he would be eligible for discretionary relief under former Section 212(c). Like the Tenth Circuit's decision in *Hem*, this case involves an alien "who proceeds to trial but forgoes his right to appeal when [Section] 212(c) relief was potentially available * * *." *Hem*, 458 F.3d at 1187. To be sure, petitioner here also relied upon the pre-IIRIRA definition of "conviction." But, contrary to the government's assertion, there is no reason why petitioner could not have "reasonably relied" upon *both* the definition of "conviction" *and* the availabili-

ty of Section 212(c) as a backstop in the event Congress expanded the definition of "conviction." See *United States* v. *Leon-Paz*, 340 F.3d 1003, 1006-07 (9th Cir. 2003) (holding alien entitled to Section 212(c) relief because he could legitimately rely on *both* the fact that his conviction did not initially render him deportable *and* on the availability of Section 212(c) relief should the class of deportable offenses change). *Cf. Sinotes-Cruz* v. *Gonzales*, 468 F.3d 1190 (9th Cir. 2006).

In this regard, the government is wrong in contending that petitioner could not have relied upon the availability of Section 212(c) relief because any reliance would have been "the product of clairvoyance about Congress's subsequent expansion of the definition of 'conviction' * * *." Opp. 11. Whether the pre-IIRIRA definition of conviction encompassed orders withholding judgment was not clear at the time of petitioner's Idaho conviction. Prior to IIRIRA, what constituted a "conviction" for immigration purposes was a "source of much debate." *Griffiths* v. *INS*, 243 F.3d 45, 49 (1st Cir. 2001). The trend in that debate, moreover, reflected "a consistent broadening of the meaning of 'conviction.'" *Saleh* v. *Gonzales*, 495 F.3d 17, 23 (2d Cir. 2007). In 1988, the BIA, as part of its ongoing attempt "to reconcile its definition of a final conviction with the evolving criminal procedures created by the various states," attempted to classify at least some deferred adjudications as convictions. *Matter of Ozkok*, 19 I. & N. Dec. 546, 550 (BIA 1988). Whether a withheld adjudication of guilt would qualify as a conviction, however, would depend upon "examination of the specific procedure used and the state authority under which the court acted." *Id.* at 551. Compare *Martinez-Montoya* v. *INS*, 904 F.2d 1018 (5th Cir. 1990)

(holding that Texas deferred adjudication process did not constitute a conviction for immigration purposes), with *Chong* v. *INS*, 890 F.2d 284 (11th Cir. 1989) (Florida procedure of withholding adjudication of guilt and imposition of sentence but placement of defendant on probation was "conviction" for immigration purposes). The BIA's definition "failed to produce the desired uniformity." *Herrera-Inirio* v. *INS*, 208 F.3d 299, 305 (1st Cir. 2000).

Against this backdrop of expansion and confusion, it would have been entirely reasonable for petitioner and others similarly situated to rely on the availability of relief under former Section 212(c) in the quite foreseeable event that the courts or Congress would further alter the definition of "conviction." Indeed, the government's contrary contention suggests that this is an *especially* suitable case for review because it would give the Court an opportunity to provide guidance on the meaning of "objective reliance" if it were to hold that to be the controlling standard.[1]

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[1] In opposing review, the government maintains that "[a]t least seven circuits have declined to extend the holding of *St. Cyr* generally to aliens convicted after going to trial rather than pleading guilty." Opp. 9. If the government means by this to suggest that these courts have categorically denied relief to aliens who have gone to trial even in the presence of actual or objective reliance, it is wrong. Indeed, one of the decisions it cites for its assertion is *Hem*, which at the cited page held that "litigants who proceed to trial but abandon their right to appeal when [S]ection 212(c) relief is available have objectively relied on pre-IIRIRA law." 458 F.3d at 1189. The other decisions cited by the government involved situations where, from all that appears in the opinions, the aliens took *no* action that could have relied on pre-IIRIRA law. See, *e.g.*, *Diaz* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002); *Mbea* v. *Gonzales*, 482 F.3d 276,

II. This Case Involves A Frequently Recurring Issue Of Substantial National Importance.

The government does not dispute that the courts of appeals' conflicting holdings present an issue of substantial national importance that potentially affects thousands of aliens who have been convicted of criminal offenses. The question presented is litigated frequently in cases before the courts of appeals, the federal district courts, and the Board of Immigration Appeals.

1. Over 95,000 aliens convicted of criminal offenses were deported in 2006. See U.S. Dep't of Homeland Sec., Immigration Enforcement Actions: 2006, at 4 tbl. 4 (2008). More were involved in deportation proceedings but had not yet been ordered removed. Many of these aliens with pre-IIRIRA convictions would be eligible for discretionary relief under former Section 212(c) if the "no reliance" or "objective reliance" standards govern. This issue therefore is of pressing importance for a vast number of aliens who have been convicted of criminal offenses.

2. The considerable judicial attention to this issue confirms the importance of the question presented. In the last seven years, the federal courts of appeals have decided dozens of cases that turn on resolution of the question presented. In addition to the cases discussed above, see, *e.g.*, *Ibanez* v. *Att'y Gen.*, 2008 WL 744211 (11th Cir. 2008); *Zamora* v. *Gonzales*, 240 Fed. Appx. 150 (7th Cir. 2007); *Cerbacio-Diaz* v. *Gonzales*, 234 Fed. Appx. 583 (9th Cir. 2007). The federal district courts have also frequently addressed the question presented on habeas re-

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281-82 (4th Cir. 2007); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002).

view or during criminal trials for unlawful reentry, highlighting the variety of contexts in which this issue arises. See, *e.g.*, *United States* v. *Garcia*, 2007 WL 2410061 (S.D. Cal. Aug. 21, 2007); *Esogbue* v. *Ashcroft*, 2005 WL 767884 (E.D. La. 2005). And the Board of Immigration Appeals often addresses such cases, resolving at least 28 of them in the last seven years. See, *e.g.*, *Matter of Everton Alphonso McKenzie*, 2008 WL 762758 (BIA 2008); *Matter of Espiridon Escalante*, 2008 WL 762733 (BIA 2008); *Matter of Juan Angel Garza-Garcia*, 2007 WL 3318644 (BIA 2007). The frequency with which the issue arises, and the profound importance of the issue to the persons affected, makes national uniformity here especially important.

III. The Department Of Justice's 2004 Regulation Provides No Basis For Denying Review.

In an attempt to escape the conflict in the circuits, the government contends that what it characterizes as an "intervening development" – a 2004 regulation denying relief under *St. Cyr* to aliens with convictions entered after trial – renders this case unfit for review. Opp. 10. That contention is mistaken. The government does not and cannot explain why this regulation would affect the decisions in the lower courts. This Court has made clear that "the anti-retroactivity principle finds expression in several provisions of our Constitution." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994). Because the "canon of constitutional avoidance trumps *Chevron* deference," *Nat'l Mining Ass'n* v. *Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (citing *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades*, 485 U.S. 568, 574-77 (1988)), there is no rea-

son that the regulation would undo the results reached by the various circuits.[2]

In any event, a large number of cases on all sides of the circuit split hav e been decided *after* the regulation was issued on September 28, 2004. Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57,826 (Sept. 28, 2004). Having adjudicated the issue already in wake of this regulation, there is no reason to believe that these courts will change course.

IV. Retroactive Application Of The Definition Of Conviction Violates Due Process.

Review is also warranted to address the retroactive definition of "conviction" created by IIRIRA's Section 322(a)(1). Pet. 24-27. While the government alleges that this Court has "rejected claims that new laws may not be applied to past conduct to render an alien deportable" (Opp. 13), the decisions it cites for this proposition pre-date the heightened rationality requirement this Court has applied to retroactive statutes.[3] See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 223 (1988) (Scalia, J., concurring) (the con-

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[2] It is true, as the government notes, that "[o]nly a few courts have considered these regulations in deciding whether *St. Cyr*'s holding applies to aliens convicted at trial." Opp. 10. But that is because the many courts that have resolved the question presented here after issuance of the regulation have recognized that it has no bearing on the issue.

[3] In fact, two of the authorities the government cites, *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957) and *Lehmann* v. *United States ex rel. Carson*, 353 U.S. 685 (1950), are inapposite because the statutes were not challenged on due process grounds at all.

stitutionality of retroactive legislation is "conditioned upon a rationality requirement beyond that applied to other legislation") (citing *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)). The Court has since confirmed that "elementary considerations of fairness * * * dictate that individuals have an opportunity to know what the law is and conform their conduct accordingly," *Landgraf*, 511 U.S. at 265.

Moreover, retroactive application of Section 322 constitutes a "manifest injustice" imposed on petitioner in violation of due process. *Bradley* v. *Sch. Bd. of City of Richmond*, 416 U.S. 696, 716 (1974). The point is made clear by the government's own presentation of the case. It argues that petitioner is foreclosed from Section 212(c) relief because, at the time he accepted the order withholding judgment, that order "*was not then deemed a 'conviction'* for immigration purposes and therefore did not render him deportable at all." Opp. 7 (emphasis added). But at the same time, the government contends that petitioner is presently subject to deportation precisely because the order withholding judgment *is now considered a "conviction"* by virtue of Section 322. Opp. 4; Pet. App. 8. Moreover, the government *concedes* that petitioner actually relied on pre-IIRIRA law when he entered the order withholding judgment. Opp. 7-8 (petitioner "gave up his right to appeal * * * in hopes of avoiding a 'conviction' that would render him deportable"). This is the "manifest injustice" (Pet. 24) of which we complain.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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